

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF AGRICULTURE

In the Matter of the Intention to
Suspend the Grade A Dairy Farm
Permit of Clearview Account

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter was heard by Administrative Law Judge Steve M. Mihalchick on March 22, 2001 in the Sibley County Courthouse, Gaylord, Minnesota. The record closed on April 20, 2001 with the receipt of the last posthearing brief.

Joan M. Eichhorst, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared on behalf of the Department of Agriculture (Department). Michael Otto, Hartmann, Trustee of the Clearview Account, P.O. Box 486, Gibbon, MN 55335, appeared on his own behalf and on behalf of the Clearview Account. Greg Pittman, Dairy Inspection Supervisor and Al Nelson, Dairy Inspector 2, testified on behalf of the Department. Michael Otto, Hartmann testified on behalf of the Clearwater Account.

NOTICE

This Report is a recommendation, **not** a final decision. The Commissioner of Agriculture will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner of Agriculture shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner of Agriculture. Parties should contact the Commissioner of Agriculture, 90 W. Plato Blvd., St. Paul, MN 55107 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether the Department complied with all procedural requirements in bringing this proceeding.
2. Whether conditions at the dairy barn and milkhouse operated by the Clearwater Account constitute violations of the Pasteurized Milk Ordinance and Minn. Rule 1530.0750, subp. 1, with regard to cleanliness, exclusion of insects and fowl, and lighting.

3. Whether the Notice of Intent to Suspend should be upheld, subjecting the Clearview Account to permit suspension upon reinspection if the noncompliant items from the inspection are not corrected.

4. Whether Article XIII, Section 7 of the Minnesota Constitution, as applied to the facts of this matter, preempts the Pasteurized Milk Ordinance.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Michael Otto, Hartmann runs the dairy operation of the Clearview Trust, located in Gibbon, Minnesota. That dairy operation includes a barn for sheltering cows that has an area for milking. Connected to the barn is a milkhouse for storage of the milk before shipping. The Clearview Trust holds a Grade A permit for the dairy products it produces. The Grade A permit was obtained from the Department pursuant to Minn. Stat. § 32.394, subd. 4, and Minn. Rule 1500.0750, subp. 1.

2. Pursuant to statute, the Department maintains a system of field inspectors to assist dairy producers in complying with the standards of the Grade A permit program.^[1] The inspectors issue notices of intent to suspend to permit holders upon finding conditions violating the standards of the program. Upon reinspection, the Grade A permit can be suspended where the identified conditions have not been corrected. The standards applied in inspections are set out in the Pasteurized Milk Ordinance (PMO) issued by the U.S. Department of Health and Human Services.^[2]

3. On November 13, 2000, Inspector Supervisor Greg Pittman and Inspector Alan Nelson visited the Clearview Trust dairy operation in Gibbon. They inspected the premises, accompanied by Mr. Hartmann, who runs the operation. Both inspectors examined all of the specific items identified in their report and both agreed that these items constituted violations of the PMO.

4. Clearview Trust's dairy barn has concrete walls. In the inspection, discoloration on the barn walls was observed. On the far end of the barn, the walls and ceiling appeared almost black from discoloration.^[3] Material appearing to be hay and feed were stuck to the walls along the stall areas. Cobwebs were hanging down from the ceiling. The lighting in the barn was dim, with some working surfaces difficult to observe due to a lack of light. A number of the light bulbs in the barn were not lit. The inspectors did not attempt to measure the foot-candles of light present at the work surfaces. The pipe inlets for connection of the milking machines were fly-specked.^[4] Chickens and nesting areas for the chickens were present in the barn. On prior inspections, Mr. Hartmann had been informed that having chickens in the barn was a violation of the PMO.^[5]

5. The milking machines are used and stored in the milking area of the barn. The milking machine passes the milk obtained into the adjacent milkhouse by a pipe through the wall. There is also a door between the milkhouse and the barn. That

door has a broken panel, providing access to flying insects between the barn and the milkhouse. The outside door of the barn was poorly fitted to its frame, allowing access to the barn by flies and other flying insects.

6. The inspectors observed a garden hose that had one end submerged in a bucket.^[6] The walls of the milkhouse were dirty in the corners and under the bulk tank. Shut-off springs on the head claws were dirty.^[7] Along one wall of the milkhouse, there were weeds growing that had entered along a gap between that wall and the concrete floor slab.

7. The inspectors prepared a report that day which contained a number of citations. The citations were intended as notice of problem areas that needed correction. Upon reinspection, failure to correct these problems would result in suspension of the Clearwater Account's Grade A permit. The citations were:

- a. The barn needs whitewashing.
- b. Several lights in the milking area were not working.
- c. There are cobwebs on the barn ceiling and walls. There appears to be a mold build [up] on the walls and on the north section of the barn.
- d. The outside of the pipeline has fly buildup on it.
- e. There are chickens in the barn, also housing for them.
- f. The milkroom door on the barn is open.
- g. There are weeds growing in the house.
- h. The milkroom floor has material on it, especially under the bulk tank.
- i. The milkroom walls, especially the corner areas and the north window have cobwebs.
- j. The green garden hose end is submerged in a bucket.
- k. The shut-off springs on the head claws have buildup. The outside of the fresh cow bucket needs cleaning.
- l. The small lid of the filter dispenser is open.
- m. The outside door is not self-closing.^[8]

The inspection report indicated that this was a Notice of Intention to Suspend Permit and that the operation would be reinspected on November 26, 2000. The Notice indicated that failure to complete the items listed by the reinspection would result in

suspension of the Grade A permit.^[9] The Notice also indicated that the permit holder had the right to a hearing to contest the findings.^[10]

7. By letter, dated November 13, 2000, Mr. Hartmann requested a hearing on the Notice of Intent to Suspend.^[11] The Department scheduled a hearing for November 16, 2000. Due to a miscommunication, the hearing could not take place on that date and the hearing was rescheduled.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Agriculture have jurisdiction over this matter under Minn. Stat. §§ 14.50 and 28A.13.

2. The Department of Agriculture gave proper and timely notice of the hearing in this matter.

3. Minn. Stat. § 32.394, subd. 4, authorizes the Department to adopt “definitions, standards of identity, and requirements for production and processing” from the PMO for Grade A dairy operations. Minn. Rule 1530.0750, subp. 1, adopts the PMO as that standard of regulation for any part of the dairy industry handling milk products bearing the Grade A label. All Grade A permit holders are required to meet the standards set forth in the PMO.

4. The conditions cited in the inspection report of November 13, 2000 were present in the dairy operation of the Clearwater Trust. Those conditions constitute violations the requirements of the PMO.

5. The Notice of Intention to Suspend the Grade A permit of the Clearwater Trust was supported by the facts uncovered in the November 13, 2000 inspection.

6. Article XIII, Section 7 of the Minnesota Constitution, which provides, “Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefore,” does not prohibit taking adverse action against the holder of a Grade A permit for failure to meet the requirements of the PMO.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED, that the Commissioner of Agriculture AFFIRM the Notice of Intention to Suspend the Grade A permit of the Clearwater Trust.

Dated this 8th day of May, 2001.

S/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped, three tapes, no transcript prepared.

NOTICE

Under Minn. Stat. §14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The inspectors used the standards of the PMO as the basis for finding conditions at the Clearwater Trust dairy operation that should be cited as violations. Mr. Hartmann maintained that the PMO, as a federal standard, cannot be applied by the Department, as a state agency. The Department is expressly authorized to adopt the PMO as a state standard by Minn. Stat. § 32.394, subd. 4, which states:

Subd. 4. **Rules.** The commissioner shall by rule promulgate identity, production and processing standards for milk, milk products and goat milk which are intended to bear the Grade A label.

In the exercise of the authority to establish requirements for Grade A milk, milk products and goat milk, the commissioner may adopt definitions, standards of identity, and requirements for production and processing contained in the "Grade A Pasteurized Milk Ordinance" of the United States Department of Health and Human Services, in a manner provided for and not in conflict with law.

To carry out this statutory directive, the Department adopted Minn. Rule 1530.0750, which states in pertinent part:

Subpart 1. **Procedures.** The production, transportation, processing, handling, sampling, examination, grading, labeling, and sale of all milk and milk products intended to bear the Grade A label, and sold for ultimate consumption within the state of Minnesota, including the inspection of dairy herds, dairy farms, milk plants, receiving stations, and transfer stations and the issuing and revocation of permits to milk producers, haulers, distributors, milk plants, receiving stations, and transfer stations, must be regulated in accordance with the provisions of the current edition

of the Grade A Pasteurized Milk Ordinance, with the following exceptions: omit sections 9, 16, and 17 in their entirety; the definitions of egg nog flavored milk and cottage cheese in parts 1530.0760 to 1530.0790 must be included in the definition of milk products.^[12]

The State has the authority to regulate the dairy industry in Minnesota. By law, the State has authorized the Department to adopt the federal standards for participation in the Grade A label program. The Department has adopted those standards in a properly promulgated rule. The standards of the PMO are properly applied to Minnesota Grade A permit holders.

Mr. Hartmann described his dairy operation as a "Grade A" operation. He has altered his system to organic means of operation. He asserted that some of his current practices, such as keeping chickens in the barn, are intended to control fly larvae in the dairy barn. The PMO prohibits fowl from the milking area.^[13] Mr. Hartmann indicated that the chickens were not in the milking area when the inspectors were present. The chickens were in other portions of the barn. But he acknowledged that there is no barrier to prevent the chickens from traveling to any part of the barn, including the milking area.^[14] The presence of chickens in the barn under these circumstances constitutes a violation of the PMO.

The illumination in the barn was described by the inspectors as "dim." The PMO sets out a standard of 10 foot-candles of illumination in the working areas of the barn.^[15] The PMO sets out a description of the lighting that will meet the standard: "one 100-watt bulb (or its fluorescent equal) for each three stanchions or per 3 meters (10 linear feet)"^[16] While the inspectors did not measure foot-candles of illumination present, the lighting in the barn failed to meet the PMO's "rule of thumb." The barn illumination citation has been demonstrated to be a violation of the PMO.

The inspectors described the barn walls as being discolored and believed the cause to be mold. Mr. Hartmann indicated that the barn was last whitewashed three years ago.^[17] He acknowledged that cobwebs were present, but that they were "taken care of" in January, 2001.^[18] Mr. Hartmann described his schedule for cleaning as: "When they get to a certain point where they can affect the quality of the milk, yes I do take care of that then."^[19] Mr. Hartmann indicated that he does not use whitewash because when he sweeps down the feed off of the walls "all the whitewash comes with it."^[20]

The PMO describes appropriate barn construction and includes standards for the finish of wall in that barn which state:

Walls and ceilings are finished with wood, tile, smooth-surfaced concrete, cement plaster, brick or other equivalent materials with light colored surfaces. Walls, partitions, doors, shelves, windows and ceilings shall be kept in good repair, and surfaces shall be refinished whenever wear or discoloration is evident.^[21]

The inspectors indicated that the normal practice for dairy operations was to whitewash concrete walls to conform to the refinishing standard. The normal routine, according to the inspectors, is to whitewash walls annually. The PMO describes the reason for these standards as “A clean interior reduces the chances of contamination of the milk or milk pails during milking.”^[22] The condition of the walls does not conform to the requirements of the PMO. If whitewash causes a problem in a particular application, some effective substitute must be used. Simply ignoring the standard is not an option.

Mr. Hartmann acknowledged the condition of the exterior door as being not tightly fitting. He asserted that the requirement of a tight fitting door was unclear and unreasonable. The PMO describes the reason for having a tight-fitting door as preventing insects from contaminating milk.^[23] The condition of the exterior door violates the PMO standard.

The inspectors noted that weeds are growing through a gap between the wall and the floor slab. Mr. Hartmann described the citation for weeds as the “most ridiculous thing I ever heard of.”^[24] The stated reason in the PMO for having tight fitting doors, excluding insects, applies with equal force to the walls and floors.^[25] If weeds can enter the milkroom, so too can insects. The gap between the wall and floor in the milkhouse violates the standards of the PMO.

A garden hose had one end submerged in a bucket. Mr. Hartmann acknowledged the condition, but maintained that there was no problem since the other end of the hose was not attached to the water supply. The PMO sets forth the standard in such situations as “no submerged inlets through which a safe water supply may become contaminated.”^[26] In such instances, a failure of water pressure can siphon contaminated water into the sanitary water supply. Although the hose was not connected to the water supply when the inspectors examined the hose, there is no assurance that the hose would be removed from the bucket before being connected and used. Maintaining a hose end that is submerged in a bucket creates an unnecessary risk of contamination and violates the PMO.

The inspectors identified several other items of equipment that appeared to be contaminated or soiled and noted material on the floor of the milkhouse. Mr. Hartmann indicated that this equipment was not so dirty as to affect the quality of the milk produced and that the inspectors mischaracterized the materials on the equipment. The PMO requires equipment in the milking barn be kept “free of filth and/or litter and shall be clean.”^[27] The floors, walls, and equipment in the milkhouse must be kept “clean.”^[28] The conditions identified by the inspectors violate the equipment and milkhouse cleanliness standards of the PMO.

Mr. Hartman maintains that the PMO standards are insufficiently defined to be enforced against him. He particularly identifies the lack of a definition of the word “clean” in the PMO as precluding enforcement.

This issue was raised before the Minnesota Supreme Court in the context of a City enforcing a local ordinance. The ordinance at issue made failure to maintain a

home in a “clean and sanitary” condition a misdemeanor criminal offense.^[29] In finding that the ordinance was not void for vagueness, the Minnesota Supreme Court stated:

The code must be read as a whole and considered in light of both its intent and its application by the city. The policy considerations underlying that intent and application mandate our result in this case. In a heavily populated urban area, the rights of those living around Ms. Reha--her neighbors--must be respected. The city has a legitimate interest in keeping the filth, debris, and trash of one property from invading another where there is a likelihood that vermin infestation threatens the entire neighborhood. Finally, Ms. Reha's conduct in this case is unreasonable to others in the same sense that, in the words of Justice Holmes, one may not “falsely shout[] fire in a theater.” ***Schenck v. United States***, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919).

Therefore, we hold that the ordinance is constitutional as applied to Ms. Reha's conduct. The ordinance, when read in conjunction with the entire code, provides fair warning of what conditions are unclean or unsanitary, and there is no evidence that the statute was applied in an arbitrary or discriminatory fashion.^[30]

Mr. Hartmann's approach replaces the standards in the PMO, which are recognized throughout the national dairy industry, with his own subjective judgment as to when the sanitary conditions affect milk quality.^[31] The cleanliness standards in the PMO are designed to prevent problems with milk quality that can arise through contamination fostered in an unclean environment. Such prevention protects consumers by eliminating milk quality problems before they could be detected through testing. Those cleanliness standards are not optional for those dairy operations that want to retain a Grade A permit. Those standards are not triggered only when some demonstrated problem arises with milk quality.

At the hearing, Mr. Hartmann described the citations he received as “vague and arbitrary.”^[32] Neither assertion is supported by the record. The inspectors identified each particular item found to be noncompliant and wrote a description of why each was found to be noncompliant. Each citation is supported by a specific requirement in the PMO. The conditions at the Clearwater Trust dairy operation violate those cited requirements.

In his argument concerning a lack of definitions, Mr. Hartmann raises hypothetical situations in which the PMO could be difficult to apply. The purpose of this hearing is to determine what facts existed at the time of the inspection, not discuss hypothetical situations. The condition of the Clearwater Trust dairy operation does not present a close question as to whether the standards were violated. If that dairy operation cannot be operated within the PMO standards, the Clearwater Trust dairy operation cannot continue to hold a Grade A permit.

Mr. Hartmann asserts that Article XIII, Section 7 of the Minnesota Constitution affords him a right to sell the milk he produces without regard to the PMO. Article XIII, Section 7 provides that, “Any person may sell or peddle the products of the farm or

garden occupied and cultivated by him without obtaining a license therefore.”^[33] The Department responded that the ALJ lacks jurisdiction to consider constitutional questions and that the cited constitutional provision does not afford an unfettered right for a milk producer to avoid the State’s regulation of products placed into commerce.

The Department is correct that no ALJ can find a statute to be unconstitutional on its face. But there is a difference between facial review and review as applied. In the latter instances, the Minnesota Court of Appeals has stated:

In a pre-enforcement action the reasonableness of the rule as applied cannot be considered, but the reasonableness of the application may be considered in a contested-case hearing.^[34]

While the PMO cannot be declared unconstitutional in a contested case hearing, disputes over the particular application of that statute to a particular set of facts is within the jurisdiction of an ALJ in such a hearing.

The issue then remains, whether the PMO applies to the facts of this contested case, in light of the language in the Minnesota Constitution. Mr. Hartmann has cited only the language of the constitutional provision in support of his argument. The Department has cited ***State v. Wright***, 588 N.W.2d 166 (Minn. App. 1998), which describes that provision in the Minnesota Constitution as follows:

Nothing suggests that this privilege, intended to help farmers bring their crops to market, creates for farmers a fundamental liberty to sell farm products. To the contrary, numerous reasonable restrictions, other exercises of the state's police powers, govern the manner in which a farmer's products may enter the market. See, e.g., The Minnesota Food Law, Minn. Stat. ch. 31 (prohibiting the sale of unwholesome, misbranded or adulterated food). The right to sell or peddle farm products is not a fundamental liberty.^[35]

Current case law holds that Article XIII, Section 7 of the Minnesota Constitution does not preempt reasonable restrictions on the manner in which farm products are sold. As discussed in the foregoing paragraphs, the restrictions imposed by the PMO are reasonable. As applied to the facts of this matter, there is no constitutional impediment to taking adverse action against the holder of a Grade A permit for failure to meet the standards required in the PMO.

This appeal was taken from the Department’s Notice of Intention to Suspend the Clearwater Trust Grade A permit. The facts in this matter demonstrate that the cited violations of the PMO were present at the time of inspection. The Minnesota Constitution does not preclude the application of the PMO to the Clearwater Trust under the facts of this matter. Therefore, the Administrative Law Judge recommends that the Notice of Intention to Suspend be AFFIRMED.

S.M.M.

^[1] Minn. Stat. § 32.394, subd. 6.

^[2] Minn. Stat. § 32.394, subd. 4; Minn. Rule 1530.0750, subp. 1.

^[3] Pittman Testimony.

^[4] Pittman Testimony.

^[5] Pittman Testimony. Hartmann had told the inspectors that the chickens were housed in the barn as a means of insect control. Since Hartmann does not use pesticides in his organic operation, he asserts that the chickens are needed to control fly larvae.

^[6] Pittman Testimony.

^[7] Nelson Testimony.

^[8] Exhibits 1 and 2.

^[9] Exhibit 2.

^[10] *Id.*

^[11] Exhibit 3.

^[12] Minn. Rule 1530.0750, subp. 1.

^[13] PMO, at 22.

^[14] The PMO allows variances for barns without floor-to-roof walls so long as “animals and fowl” can be kept “from entering the barn” PMO, at 22.

^[15] PMO, at 22 and 122.

^[16] *Id.* at 122.

^[17] Hartmann Testimony.

^[18] *Id.*

^[19] Hartmann Testimony.

^[20] Hartmann Testimony.

^[21] PMO, at 22.

^[22] *Id.*

^[23] PMO, at 24-25.

^[24] Hartmann Testimony.

^[25] The sample Dairy Farm Inspection Report, Appendix M of the PMO, states under the heading of Pest Control that, “All milkhouse openings effectively screened or otherwise protected; doors tight and self-closing; screen doors open outward.” A gap between the wall and the floor is an “opening” within the meaning of the PMO.

^[26] PMO, at 29.

^[27] PMO, at 22.

^[28] PMO, at 27.

^[29] ***State, City of Minneapolis v. Reha***, 483 N.W.2d 688, at 690 (Minn. 1992)

^[30] ***State, City of Minneapolis v. Reha***, 483 N.W.2d at 693. It must be noted that Justice Gardebring dissented in this case, maintaining that the words “clean and unsanitary” have too many different meanings to provide adequate notice of what conduct is prohibited.

^[31] See, e.g. PMO, at v (the preface which credits “all segments of the dairy industry including producers, [and] plant operators” for contributing to the development of the PMO).

^[32] The Department maintained that this could be a facial challenge to the constitutionality of the statute and rules governing the Grade A permit program. Such a challenge is beyond the jurisdiction of this tribunal. ***Rocco Altobelli, Inc. v. Dept. of Commerce***, 524 N.W.2d 30, 31 (1994). But the challenge in this matter is to a standard as applied to a particular fact situation. In such an instance, the

^[33] Minnesota Constitution Article XIII, Section 7.

^[34] ***Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency***, 469 N.W.2d 100, 107 (Minn.App. 1991).

^[35] ***State v. Wright***, 588 N.W.2d 166, 168 (Minn.App. 1998).